The second ground of appeal was that the learned Judge erred in law in holding that the appellant corruptly accepted $50 for himself as specified in the charge; it was submitted that the third and sixth prosecution witnesses alleged that the appellant asked for a sum of $300 to be given to the Officer-in-Charge of the Police District. It is true that these two witnesses stated that the appellant had so told them but we do not consider that, on consideration of all the evidence, the trial Judge was wrong, in finding that, in fact, the appellant had asked for the money for himself.

The third ground of appeal was that the trial Judge erred in law in that he did not warn himself of the danger of convicting the accused on the uncorroborated evidence of accomplices. The relevant part of the trial Judge's Grounds of Decision runs as follows: "I did not regard them (P.W.'s 3, 5, 6 and 7) as accomplices whose evidence is unworthy of belief, and even if they were to be considered as such I warned myself of the danger of accepting their evidence." It was argued by Counsel for the appellant that once the trial Judge had come to the conclusion that the said prosecution witnesses were not accomplices it was impossible for him to warn himself adequately against the dangers of convicting upon their evidence and that, on the assumption that these prosecution witnesses were accomplices, he did not warn himself against the dangers of convicting upon their uncorroborated evidence. While we consider that the warning as expressed in the Grounds of Judgment would not be a sufficient direction in the case of a trial by Jury or with assessors, we are satisfied that the trial Judge had clearly in mind the legal problems relating to the evidence of accomplices, and particularly the provisions of Section 13(3) of the Prevention of Corruption Ordinance, 1950. The evidence clearly shows that it was the accused who played the leading part in this corrupt transaction and that the money was paid by the aforementioned four prosecution witnesses after various requests moving from the appellant.

We could, therefore, see no ground for quashing the conviction and dismissed the appeal

Appeal dismissed.

Solicitors for the appellant: *Pillai, Lim, Lee & Hwang.*

RAMASAMY v. REGINA

[A. Cr. J. (Spenser Wilkinson J.) March 30, 1955]
[Penang — Criminal Appeal No. 8 of 1955]

Criminal law and Procedure — Recall of witness for further evidence — Evidence Ordinance, 1950, s. 165 — Criminal Procedure Code (Cap. 21), s. 451 — Powers of Magistrate under — Discretion of Court to recall witness after close of defence case — Provisions of s. 182(f) Criminal Procedure Code — Negligent driving — Res ipsa loquitur doctrine.

The appellant in this case, on a charge of negligent driving of a motor cycle contrary to s. 4(2) Motor Vehicles (Driving Offences) Proclamation was convicted and fined $50; his licence was endorsed and he was ordered to pay $100 as compensation to the complainant.

At the close of the defence case, the learned Magistrate formed the opinion that further evidence should be called and he invoked s. 165 of the Evidence Ordinance. He then directed for further investigation.

Held: (1) s. 165 of the Evidence Ordinance, 1950, does not apply to Magistrates' Courts at all. The appropriate section in so far as the Magistrates' Courts are concerned is s. 451 of the Criminal Procedure Code (Cap. 21); (2) in view of the provisions of s. 182(f) of the Criminal Procedure Code (Cap. 21) it is of the utmost importance that the whole of the case for the prosecution should be put before the Court before the defence is called upon. If the case for the prosecution does not disclose a case which then warrants a conviction the defendant is entitled to an acquittal. If the prosecution or the Court is going to make further investigations and call further evidence after the accused had been called upon for his defence then the provisions of s. 182(f) will become nugatory.

The evidence of negligence in this case was extremely scanty and it appeared that the learned Magistrate had applied the doctrine of *res ipsa loquitur*.

Held: it is wrong to apply the doctrine of *res ipsa loquitur* in criminal cases in which negligence must be positively proved.

Cases referred to:—

(1) *Public Prosecutor v. Yeoh Chee Bah & Ors.* (K.L. — Criminal Miscellaneous Application No. 7 of 1947 — unreported).

(2) *Yap Fook Yew & Anor. v. Public Prosecutor* (K.L. — Criminal Appeal No. 47 of 1949 — unreported).

(3) *Balfour v. Public Prosecutor* (1949) M.L.J. Supp. 8.

(4) *Rex v. Bakar bin Sahat* (1951) M.L.J. 202; 2 M.L.R. 207.

(5) *Rex v. Day* (1940) 1 All E.R. 402.

CRIMINAL APPEAL.

G. H. Goh for the appellant.

D. C. Jackson (Sr. Federal Counsel) for the respondent.

Spenser Wilkinson J.: — The appellant in this case was charged with negligent driving of a motor cycle contrary to section 4(2) of the Motor Vehicles (Driving Offences) Proclamation. He was convicted and fined $50 his licence was endorsed and he was ordered to pay compensation to the complainant in the sum of $100.

The complainant's case was that he was walking along Perak Road when he was knocked down from behind and rendered unconscious, and his evidence was to some extent supported by P.W. 2, a widow, who stated she was in front of her house at the time and witnessed the accident. The case for the appellant on the other hand was that as he approached the entrance of the Perak Road hospital a Chinese cyclist came out of the hospital entrance, that he swerved to the left to

avoid the cyclist but collided with the rear mudguard of the cycle and that as a result of sudden braking he lost control and fell off his motor cycle. Evidence was given by a lorry driver to the effect that he approached the scene of the accident in the lorry and saw a bicycle, a Chinese and an Indian lying on the road, and also a motor cycle lying on the left side of the road near the drain.

After all the evidence for the prosecution and the defence had been given the learned Magistrate recalled P.W. 3, who was a police constable and asked him whether he had inquired at the houses nearby whether anyone had witnessed the accident and the witness stated that no one had. The learned Magistrate then directed a Police Inspector to investigate whether a police constable accompanied the parties to the General Hospital in the lorry, and if so, to produce the police constable before the Court at a later date.

At the adjourned hearing the Court called Police Constable 3884, who stated that he saw no bicycle at the scene when he arrived; Police Constable 3984, who said that he saw no bicycle at the scene; and Dr. Chee Seh Yeong, a Medical Officer from the General Hospital, who gave evidence of the injuries sustained by the complainant.

In his grounds of judgment the learned Magistrate says :—

"While appreciating the undesirability of calling further witnesses for the prosecution after the case for the defence closed the Court formed the opinion that the fact whether or not the boy who was struck was riding a bicycle or walking was of the utmost importance."

Later in his grounds he says :—

"The Court was of opinion that the fact of the existence of the bicycle could not be foreseen by the prosecution in view of the nature of the evidence of prosecution witnesses. The Court decided, therefore, to invoke s. 165 of the Evidence Ordinance and to call further evidence."

In the first place I would remark that section 165 does not appear to apply to Magistrates' Courts at all and refers specifically to the Judge, although in most other Sections the references are to the Court. The appropriate Section in so far as the Magistrates' Courts are concerned is Section 451 of the Criminal Procedure Code. It has been held, however, that although that Section empowers a Court to call evidence at any time there is a clear and distinct limitation upon this discretionary power. I have pointed out before that although a section of the Code may give the Court a very wide discretion such discretion must be exercised subject to such well-known legal principles as are applicable in each case — *Public Prosecutor v. Yeoh Chee Bah & Ors.*[1], and *Yap Fook Yew & Anor. v. Public Prosecutor*[2]. I would also refer to the case of *Balfour v. Public Prosecutor*[3] in which the Court of Appeal held that the calling of a witness by a trial Judge in the High Court after the defence evidence had been called was a wrong exercise of discretion and that the evidence ought to be excluded. (See also *Rex v. Bakar bin Sahat*[4]).

The learned Magistrate appears to have thought that the case before him came within the principle of *Rex v. Day*[5], where it was held that when any matter arises *ex improviso* which no human ingenuity can foresee there is no reason why that matter may not be answered by contrary evidence on the part of the Crown, and applied this rule to a case where a witness was called in a criminal trial by the trial Judge after the case for the defence was closed. It appears to me, however, that the learned Magistrate overlooked the fact that the appellant made a report to the Police seven days after the accident (i.e. as soon as he was physically fit to do so) in which this collision with the bicycle was mentioned. Indeed, the gist of the report made by the appellant is the same as the gist of the evidence he gave at the trial. The prosecution must have had access to this report, and I have little doubt that they were well aware of its contents at the time of the trial.

In view of the provisions of section 182(f) of the Criminal Procedure Code it is in my opinion of the utmost importance that the whole of the case for the prosecution should be put before the Court before the defence was called upon; for if the case for the prosecution does not disclose a case which then warrants a conviction the defendant is entitled to an acquittal. If the prosecution or the Court is going to make further investigations and call further evidence after the accused has been called upon for his defence then the provisions of section 182(f) will become nugatory.

It appears to me quite clear from the grounds of decision of the learned Magistrate that at the close of the evidence for the prosecution and the defence he was left in doubt as to the guilt of the appellant and it was only the further evidence that he called which removed this doubt. It was upon this ground that the learned Deputy Public Prosecutor who appeared before me felt unable to support the conviction.

I would add that upon any view of the case the evidence of negligence was extremely scanty and it looks very much as though the learned Magistrate had applied the principle adopted in civil cases of *res ipsa loquitur* to a criminal case. It has frequently been held that this principle does not apply to criminal cases in which negligence must be positively proved.

For these reasons I allowed the appeal and quashed the conviction. The fine and the compensation must be returned to the appellant and the endorsement of the licence must be cancelled.

Appeal allowed.